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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

JERRY MILLIGAN, Plaintiff and Respondent, v. FINANCIAL INDEMNITY COMPANY, Defendant and Appellant.	B166800 (Los Angeles County Super. Ct. No. BS079821)

APPEAL from a judgment and order of the Superior Court of Los Angeles County. James Otereo, Judge. Affirmed.

Manning & Marder, Kass, Ellrod, Ramirez and Scott Wm. Davenport for Defendant and Appellant.

Richard M. Katz for Plaintiff and Respondent.

Financial Indemnity Company (FIC) appeals: (1) the judgment confirming an award for Jerry Milligan from an arbitration involving Milligan's underinsured motorist (UIM) insurance policy; and (2) the post-judgment order denying FIC's motion to vacate the judgment. FIC claims the court erred in confirming the arbitration award because the amount of the award exceeded Milligan's policy limits. FIC, however, failed to timely seek to modify, vacate or otherwise challenge the arbitrator's authority to issue the award as provided by the Code of Civil Procedure. FIC's failure resulted in a waiver of the right to contest the amount of the award in the trial court. Thus, the court did not err in confirming the arbitration award or in denying FIC's motion to vacate and therefore, we affirm.

FACTUAL AND PROCEDURAL HISTORY

Milligan was involved in an automobile accident with an underinsured motorist. After he settled his third-party claim he asserted a claim for insurance benefits against his insurance carrier, FIC under his UIM policy. As required by the terms of the UIM policy, the matter was submitted to binding arbitration.

The only issues presented to the arbitrator concerned the extent of Milligan's injuries from the accident and whether his treatments were reasonable and necessary. The arbitrator was not asked to decide whether the UIM policy covered the injuries or the amount of damage Milligan would be entitled from FIC under the UIM policy. In fact, no evidence concerning coverage was presented in the arbitration. Nonetheless, the arbitration award, stated: "Arbitrator finds . . . the treatment was in fact necessary and the costs for such treatment were reasonable. Therefore, the arbitrator awards the amount prayed for $45,000 but this amount is reduced by $20,000, the amount paid by the third party, ($15,000) and the medical payments of $5,000 which his carrier paid him, for a net award of $25,000." On June 6, 2003, the arbitrator served the award.

The UIM policy limits were $15,000. FIC did not file an application with the arbitrator to object to or to correct the award, nor did FIC file a petition with the court to correct or vacate the award. Instead, on June 20, 2002, FIC sent Milligan a check for $15,000.

On December 3, 2002, Milligan filed a petition to confirm the $25,000 arbitrator's award. FIC opposed the petition asserting that Milligan was not entitled to have the award confirmed because it had already paid the award up to the policy limits. The trial court granted the petition, concluding that it was without jurisdiction to vacate or correct the award because FIC had failed to petition the court to vacate or correct it within 100 days after service of the award as required by the Code of Civil Procedure. On January 24, 2003, the court entered judgment.

Thereafter, on February 24, 2003, FIC filed a motion to vacate the judgment, arguing as it had before that Milligan had already received the full benefits under his UIM insurance and was not entitled to a judgment in excess of the policy limits.

The court denied the motion

FIC timely appeals from the judgment and the post-judgment order.

DISCUSSION

The Court Did Not Err in Confirming the Arbitration Award or in Denying the Motion to Vacate the Judgment.[1]

FIC characterizes the first issue on appeal as whether an insured may obtain a judgment against his insurance company in excess of the amount of the applicable policy. Here the judgment is based upon an arbitration award against FIC that exceeds the

[1] Because FIC's arguments in support of the motion to vacate the judgment are the same as those asserted in opposition to the motion to confirm the award, we discuss and resolve the appeals of each together.

applicable UIM policy limit by $10,000. Thus, this issue turns on whether the arbitrator exceeded his authority in awarding Milligan an amount of damages that exceeded the amount of the UIM policy limits. We do not decide this issue, however, because the time in which to assail the arbitrator's power to issue an award has expired.

Under the Code of Civil Procedure, FIC had 100 days after service of the award to file a petition with the court requesting the award be vacated or corrected on the grounds the arbitrator exceeded his power in making the award. (Code Civ. Proc., §§ 1285, 1286.2, subd. (a)(4), 1286, subd. (b), 1288.) FIC did not seek to have the arbitrator's award set aside or corrected within the statutory time limits. Consequently, the trial court had no option but to confirm the arbitration award when Milligan filed his petition.

In reaching this conclusion we reject FIC's argument that it had no procedural mechanism in which to seek to have the arbitrator's award reduced since the amount due under the policy was not a proper issue for the arbitrator. The appropriate procedural mechanism to make such a claim is that described above – to file a petition under Code of Civil Procedure sections 1286.2, subdivision (a)(4), and 1286, subdivision (b), asserting the arbitrator exceeded his powers in deciding an issue excluded from the arbitration. FIC failed to file such a petition and thus, we conclude the court did not err in confirming the arbitration award.

This result is also in accord with *Weinberg v. Safeco Insurance Company of America* (2004) 114 Cal.App.4th 1075, 1082-1083. In *Weinberg,* as here, the arbitrator issued an award to an insured that exceeded the applicable UIM policy limits notwithstanding the facts the neither the extent of coverage nor the amount owed by the insurer was submitted to the arbitrator. Also similar to this case, the insurer failed to seek correction and vacation of the arbitration award within 100 days after it was served.

Accordingly we concluded the insurance company had effectively waived its right to subsequently challenge the award.[2] (*Ibid.*)

Our conclusion on the first issue on appeal also answers the second issue presented, namely, whether an insurance company is liable for a judgment in excess of policy limits where it pays the full proceeds under the UIM policy and where the issues of the amount of coverage and the amount the insurer owes the insured were never presented to the arbitrator, simply because the insurance company did not move to reduce the amount of the award. As discussed above, FIC's failure to timely move to correct or vacate the award results in FIC's liability for the full amount of the award, irrespective of its payment of benefits under the UIM. While the judgment appears to represent a

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[2] At oral argument, we asked the parties to address the application of *Weinberg*. Citing *Smith v. Rae-Venter Law Group* (2002) 29 Cal.4th 345, FIC argued *Weinberg* should not apply retroactively in this matter. We disagree. After recognizing the general rule that judicial decisions are given retroactive effect, *Smith* states: "there is a recognized exception when a judicial decision *changes a settled rule* on which the parties below have relied [and] [r]etroactive application of an *unforeseeable procedural change* is disfavored . . . ." (*Id.* at pp. 372-373; emphasis added.)

Weinberg does not fall within the exception to the general rule of retroactive application of case law. *Weinberg* dealt with a factual situation which appears unique in the case law. However, neither *Weinberg*'s legal analysis or conclusion are novel, nor are they at variance with any settled rule. *Weinberg* engages in a straightforward interpretation of the Code of Civil Procedure sections governing the time limits for moving to correct an arbitration award as well as the other code sections concerning an arbitrator exceeding his or her authority in making awards. Based on a clear and plain reading of the statutes dealing with these matters, the outcome of *Weinberg* is entirely predictable and does not present an unforeseeable procedural change. Consequently, *Weinberg* applies retroactively based on the rules of retroactivity announced in *Smith.*

In any event, the application of *Weinberg* is not dispositive here. As set-forth above, we have engaged in an independent analysis of the law and facts of this matter and conclude the trial court did not err in affirming the arbitration award, notwithstanding *Weinberg.*

windfall for Milligan, FIC had an opportunity to prevent this result by timely arguing the arbitrator had exceeded his powers by awarding damages in excess of the UIM policy limits. FIC, however, failed to do so.

As this court cautioned in *Weinberg*, "[u]nless and until the Legislature provides for a mechanism to address what is to be done when an arbitrator is not asked to determine the insurer's liability, but issues an award of damages, it is incumbent upon the parties to see that the arbitrator does not make an award of damages, but instead issues a declaration of liability or of rights. . . . [I]f the arbitrator makes an award of damages in excess of the policy limits, then the insurer must move in a timely manner, either before the arbitrator or in court, to vacate the award or correct it or risk having the court confirm the entire award upon a motion to confirm by the insured." (*Weinberg v. Safeco Insurance Company of America, supra,* 114 Cal.App.4th at p. 1084.)

In view of the foregoing, we conclude the court did not err in granting the petition to confirm the arbitration award or in denying the motion to vacate the judgment.

DISPOSITION

The judgment is affirmed. Respondent is entitled to costs on appeal.[3]

WOODS, J.

We concur:

PERLUSS, P.J. JOHNSON, J.

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[3] We also deny respondent's motion for sanctions against appellant for filing a frivolous appeal. Although appellant's appeal was not successful, we are not convinced that it was frivolous or filed for an improper purpose.